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Substitute Assets / Pension Plans / Appeals

- **The Government has the right to appeal the district court's refusal to order the forfeiture of a particular asset in a criminal case, including property forfeitable only as a substitute asset.**

- **A defendant's pension fund may be forfeited as a substitute asset in a criminal case notwithstanding section 408 of ERISA, which provides that an employee's interest in his pension plan is "nonforfeitable." That statute does not apply to forfeitures imposed in connection with violations of the criminal law.**

- **Property that the Government suspects, but cannot prove, was derived from the criminal offense may be forfeited as a substitute asset. It is not necessary for the Government to prove that the substitute asset is untainted.**

Defendant and a codefendant were convicted of RICO offenses and were found jointly and severally liable for the forfeiture of the $3 million that they derived from their racketeering activity. The Government sought to satisfy the $3 million judgment by forfeiting Defendant's interest in a residence, an investment fund, and a pension fund as substitute assets.

The district court granted the Government's request and ordered the forfeiture of the residence and the investment fund, but it declined to order the forfeiture of the pension fund. The court reasoned that pension funds are covered by section 408 of the Employee Retirement Income Security Act (ERISA), which provides that an employee's interest in his retirement account is "nonforfeitable." *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996). Defendant appealed from the forfeiture of the residence and investment fund, and the Government cross-appealed the court's refusal to forfeit the pension fund.

As a threshold matter, the Seventh Circuit held that the Government was entitled to appeal from the district court's refusal to enter an order forfeiting certain property. Criminal forfeiture, the court held, is part of sentencing process. Thus, the district court's refusal to enter a forfeiture order is appealable like any other sentencing issue under 18 U.S.C. § 3742(b).

Defendant argued that, even if this were true generally, it should not apply to the forfeiture of substitute assets. The forfeiture of substitute assets, Defendant asserted, was not a sentencing issue but, instead, was a procedural device that allowed one asset to be substituted for another. But the panel saw no reason to treat substitute assets differently for the purposes of appeal. The Government therefore has the same right to appeal under section 3742(b) whether or not it is seeking forfeiture under a substitute assets theory.

On the merits of the case, the panel first addressed the Government's request to forfeit Defendant's pension fund. Taken literally, section 408 of ERISA does seem to say that a pension fund is "nonforfeitable." But, in the ERISA context, "nonforfeitable" means only that the employee's interest in his pension is "vested." In other words, if the employee loses his job, he does not "forfeit" his pension because his right to the pension has vested. Nothing in the use of the term "nonforfeitable" in ERISA was intended to apply to the forfeiture of property rights in connection with a violation of the criminal law. Hence, the district court erred in reading section 408 literally and thereby refusing to grant the Government's request to order the forfeiture of the pension fund as a substitute asset.

With respect to the other two assets, Defendant's argument in the district court was that the residence and investment fund belonged to his wife, children, and other family members and therefore could not be forfeited in his criminal case. The district court rejected this argument, holding that Defendant was the true owner of the property. *United States v. Infelise, supra*. On appeal, however, Defendant abandoned this argument. Instead, he argued that the residence and investment fund could not be forfeited as substitute assets because both were, in fact, traceable to the underlying crimes.

The court of appeals found this argument creative but unpersuasive. It would be unreasonable, the court held, to require the Government to prove that each item it sought to forfeit as a substitute asset was *not* tainted by the criminal offense. The world is not clearly divided between tainted and untainted assets, the court said. "There will often, it seems to us, be property falling somewhere in between, property which may be suspected of being tainted but which the [G]overnment cannot prove is derived from racketeering activity. We are convinced that such property can be forfeited [as substitute assets]." —*SDC*

United States v. Infelise, ___ F.3d ___, Nos. 96-3252 and 96-3769, 1998 WL 736999 (7th Cir. Oct. 23, 1998). Contact: AUSA Stephen Anderson, AILN01(sanderso).

Pretrial Restraining Order

- **If the Government obtains an *ex parte* pretrial restraining order in a criminal case, the defendant may be entitled to a post-restraint, pretrial hearing to determine if the restraining order should be continued through the conclusion of the trial.**

- **A post-restraint, pretrial hearing is only required, however, in cases where the defendant demonstrates that he has no funds, other than the restrained assets, to hire private defense counsel or to pay for living expenses for himself and his family.**

- **The pretrial hearing is limited to the forfeitability issue. If the defendant demonstrates a reasonable basis to**

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believe that the restrained property is *not* traceable to the underlying offense, the Government must establish probable cause to believe that the property is subject to forfeiture; but the defendant may not challenge the grand jury's finding of probable cause regarding the underlying crime.

The Government charged Defendants with federal health care offenses and sought criminal forfeiture of the proceeds of those offenses under 18 U.S.C. § 982(a)(6). The Government also moved for a post-indictment order restraining $1.5 million of Defendants' assets. The district court entered the restraining order *ex parte* pursuant to 21 U.S.C. § 853(e)(1)(A).

Defendants then requested the opportunity to challenge the restraining order at a post-restraint, pretrial hearing. Defendants asserted that they needed the restrained funds to hire defense counsel and to pay for living expenses. They also asserted that the grand jury lacked probable cause to believe either that Defendants committed the underlying health care offenses or that the restrained property was traceable to those offenses. The district court held that neither section 853(e)(1)(A) nor the Due Process Clause required the court to hold a post-restraint hearing. Defendants appealed.

On appeal, the **Tenth Circuit** agreed that section 853(e)(1)(A) contains no provision for a post-restraint, pretrial hearing on whether a restraining order should be continued through the duration of the trial. But the panel disagreed with the Government's contention that the grand jury's determination of probable cause, and the defendant's opportunity to contest the forfeiture at trial, would afford a defendant adequate due process in all circumstances.

Where the defendant establishes that he needs the restrained funds to hire counsel of his choice to represent him at trial, or to provide for himself and his family, the risk of erroneous deprivation outweighs the Government's legitimate desire to avoid a pretrial adversarial hearing on the grand jury's finding of probable cause, the court said. Thus, in those circumstances, a defendant is entitled to a post-restraint, pretrial hearing.

The court was careful, however, to circumscribe both the scope of the hearing and the circumstances in which it will be required. First, defendants are not automatically entitled to a hearing, but must "demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel or provide for herself and her family." The court specifically left undisturbed an earlier Tenth Circuit case holding that there is *no right* to a post-restraint, pretrial hearing where the defendant seeks to challenge the restraining order for other reasons. "[*United States v. Musson*, 802 F.2d 384, 387 (10th Cir. 1986)] did not involve assets sought for legal and living expenses. This distinction is of course the sticking point. It is the potential erroneous deprivation of these important interests that tips the *Mathews* balancing test in favor of requiring a hearing."

Second, the court held that the adversarial hearing must be limited to whatever challenges the defendant might make to the *forfeitability* of the property, after first making "a *prima facie* showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets constituted . . . gross proceeds traceable to" the health care offense. The Government bears the ultimate burden of establishing probable cause regarding the forfeitability issue; but the defendant may not use the post-restraint hearing as an opportunity to obtain early discovery of the Government's case if he has no basis for belief that the Government will not prevail. Moreover, the challenge must be limited to the forfeitability issue; the defendant has no right to challenge the grand jury's probable cause finding regarding the underlying criminal offense.

—*SDC*

United States v. Jones, ___ F.3d ___, Nos. 98-2131 and 98-2133, 1998 WL 792455 (10th Cir. Nov. 16, 1998). Contact: AUSAs Steve Kotz, ANM01(skotz), and Mary Higgins, ANM01(mhiggins).

Comment: This decision is consistent with the decisions of the other circuits on these issues. First, the panel recognizes that there are two categories of restraining order cases: (1) those where the defendant seeks release of the funds to pay for legal and living expenses; and (2) those where he seeks release for some other reason. A majority of the circuits hold that, where the Sixth

Amendment right-to-counsel issue is implicated, a post-restraint, pretrial hearing is required under the Due Process Clause. *See United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (defendant has a right to a post-restraint, pretrial hearing if the shows, in the first instance, that he lacks other funds to pay for counsel and living expenses); *see also United States v. Monsanto*, 924 F.2d 1186, 1195-97 (2d Cir. 1991); *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985); *United States v. Moya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988); *United States v. Thier*, 801 F.2d 1463, 1469 (5th Cir. 1986); *but see United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir. 1989) (denying hearing even though defendants said they needed the money to hire counsel); *In Re Billman*, 915 F.2d 916 (4th Cir. 1990) (*dicta* suggesting no hearing is needed even where party asserts need for funds to pay counsel).

With respect to the second category of cases, where the defendant is seeking release of restrained property for reasons unrelated to the Sixth Amendment, the courts are split over whether the defendant is entitled to a post-restraint, pretrial hearing. As mentioned, the Tenth Circuit continues to hold that the defendant in such a case is *not* entitled to a hearing. *See United States v. Musson*, 802 F.2d 384, 387 (10th Cir. 1986); *United States v. Nichols*, 841 F.2d 1485, 1491 n.4 (10th Cir. 1988). The Eleventh Circuit is in accord. *See United States v. Bissell, supra*; *United States v. St. Pierre*, 950 F. Supp. 334 (M.D. Fla. 1996) (following *Bissell*; defendant has ample opportunity to challenge forfeiture at trial); *In Re Protective Order*, 790 F. Supp. 1140 (S.D. Fla. 1992). But other circuits apparently would afford the defendant a hearing in this situation. *See Monsanto* and *Crozier, supra*; *see also Kirschenbaum, supra* (whether the defendant is entitled to a post-restraint, pretrial hearing in a case where the Sixth Amendment is not implicated is an open question in the Seventh Circuit).

Finally, with respect to the scope of the hearing, all circuits (except the Second) that have addressed the issue hold that the defendant is entitled to challenge the probable cause supporting the forfeitability of the property, but he is not entitled to challenge the grand jury's finding of probable cause with respect to the underlying criminal offense. *See United States v. Monsanto*, 924 F.2d at 1195-97 (court required to review probable cause regarding the underlying crime); *but see United States v. Moya-Gomez*, 860 F.2d at 729 (court limits inquiry to forfeiture issues); *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (restraining order vacated where forfeitability of property not demonstrated); *United States v. St. Pierre, supra* (defendant is not permitted to challenge grand jury's finding of probable cause; declining to follow *Monsanto*).

—*SDC*

Pretrial Restraining Order / Pension Plans

■ **Ninth Circuit affirms district court's issuance of a pretrial restraining order, pursuant to 21 U.S.C. § 853(e)(1), against assets in a employee stock ownership plan.**

The trustee of an employee stock ownership plan (ESOP) appealed a preliminary injunction issued pursuant to 21 U.S.C. § 853(e)(1), enjoining the ESOP's assets from being sold or distributed. The **Ninth Circuit** affirmed the preliminary injunction.

The court noted that the district court, at the trustee's request, had modified the order to ensure that the interests of employees who had not been charged with crimes were not affected. Moreover, the preliminary injunction did not appear on its face to affect routine management of the assets which remained under the trustee's control. Accordingly, the court held that the district court did not err in concluding that the restraining order was appropriate to preserve the availability of assets for criminal forfeiture. If problems should arise, the court said, the trustee bank could always seek clarification of the order from the district court.

—*JRP*

United States v. Sumitomo Bank, Nos. 98-10049, 98-10157, 1998 WL 767156 (9th Cir.

Oct. 28, 1998) (unpublished). Contact: AUSA Bill Shipley, ACAEF01(bshipley).

Ancillary Proceeding

■ **Defendant's minor children have no legal interest in real property held exclusively in the defendant's name, and therefore have no basis for challenging a criminal forfeiture order, even though the property is their residence.**

Defendant was convicted of a drug offense and was ordered to forfeit his residence, pursuant to 21 U.S.C. § 853(a), because it was used to facilitate the criminal activity. In the ancillary proceeding, Defendant's minor children filed claims asserting a legal interest in the property. They also argued that there was no factual basis for the forfeiture.

The court noted that there are only two grounds on which a third party may challenge a criminal forfeiture order under section 853(n). Under that statute, the claimants must either establish that they had a vested interest in the property at the time of the criminal offense, or they must show that they subsequently acquired the property as bona fide purchasers for value. In both instances, state property law is used to determine the claimant's alleged interest.

In this case, the minor children offered no evidence that they had purchased the property in accordance with New Jersey law on the transfer of an interest in real estate. Therefore, they could not be bona fide purchasers. Nor was the claimants' biological relation to Defendant sufficient to establish a vested interest in their residence. Under state law, the "rights of a prospective heir do not vest until the death of the intestate decedent." Therefore, the minor children had no legal interest in property that was held exclusively in their father's name.

On the claimants' second point, the court did not, as it might have done, reject the challenge to the forfeitability of the property on the ground that it had already found that the claimants' had no legal interest in the property. Instead, the court held that a factual basis for the forfeiture of the residence as facilitating property had been established in Defendant's guilty plea, and the claimants had offered an insufficient basis for overturning that finding. —*SDC*

United States v. Antonelli, No. 95-CR-200, 1998 WL 775055 (N.D.N.Y. Nov. 2, 1998). Contact: AUSA Thomas P. Walsh, ANYNA01(twalsh).

Comment: This case reaches the correct result, of course, but it would be greatly preferred if courts did not feel obliged to consider and reject third-party challenges to criminal forfeitures on the merits. This case provides an excellent example of what is wrong with that approach. Here, the court had little trouble in dismissing the challenge to the forfeitability of the residence for lack of evidence. But, what would the court have done if it had found that the claimants had put forward valid grounds for questioning the connection between the property and the drug offense? The court had already found that the claimants had no legal interest in the property. The only person with a legal interest, the defendant, had already pled guilty and agreed to the forfeiture.

If the court, in those circumstances, had found reason to question the forfeitability of the property, it would have had only two choices: (1) to turn the property over to parties with no legal interest in it (thus granting a windfall to the third party who serendipitously happened to be the first to challenge the forfeiture); or (2) to return the property to the defendant who had agreed to forfeit it as part of his plea. In stark terms, this dilemma underscores the reasons why third parties are limited to the grounds set forth in section 853(n) when challenging criminal forfeiture orders, and why they therefore should not be permitted to challenge the forfeitability of the property. —*SDC*

Criminal Forfeiture / Proceeds / Burden of Proof

- **Criminal forfeiture under section 853(a)(1) is limited to the proceeds of the offenses for which the defendant is convicted. Because the defendant was convicted of only three drug sales totalling $5300, the balance of the cash found in his possession could not be forfeited in the criminal case.**

- **Ninth Circuit reaffirms that the standard of proof for criminal forfeiture is preponderance of the evidence.**

- **If the court's instructions to the jury on the different standards of proof are adequate to ensure that the jury does not mistakenly apply the lower standard when determining the defendant's guilt, a bifurcated trial is not necessary.**

Defendant and a codefendant sold methamphetamine to undercover agents on three occasions over a period of six weeks. On each occasion, the agents paid for the drugs with marked bills which totalled $5,300 for the three sales. Ultimately, Defendant was arrested and the agents executed a search warrant at a storage locker that Defendant had rented under an assumed name. In the locker, the agents found $43,070 in currency, including all but $1,000 of the marked bills from the undercover sales.

Defendant was indicted on three substantive drug counts and a drug conspiracy count charging an agreement to commit the same three substantive violations. The indictment also sought the criminal forfeiture of the entire $43,070 as proceeds of drug trafficking under 21 U.S.C. § 853(a)(1). Defendant was convicted and the money was forfeited. On appeal, the **Ninth Circuit** vacated and remanded the forfeiture judgment.

As a threshold matter, the court reaffirmed the Ninth Circuit rule that the standard of proof in a criminal forfeiture case is preponderance of the evidence. The lower standard applies because a criminal forfeiture is not a separate offense, "but is merely an additional penalty for an offense that must be proved beyond a reasonable doubt." The court also found no error in the district court's decision to send the entire case to the jury at one time without bifurcating the guilt phase and the forfeiture phase. The district court's instructions on the respective standards of proof on guilt and forfeiture were adequate, the panel held, to ensure that the jury did not apply the lower standard in rendering its guilty verdict on the criminal charges.

By a vote of 2-1, however, the panel held that the Government failed to prove that the entire $43,070 seized from Defendant's storage locker constituted the proceeds of the offenses for which Defendant was convicted. Only $4,300 of the money in the locker, the court said, could be traced to the undercover drug sales. Because forfeitures under section 853(a)(1) are limited to the property the Government can prove is traceable to the offenses for which Defendant was convicted, the balance of the seized money could not be forfeited.

The Government attempted to rely on the rebuttable presumption in section 853(d) to establish that the full $43,070 was derived from Defendant's drug sales. But the presumption only applies to property acquired during the period of the criminal violation. *See* section 853(d)(1). Because the Government offered no evidence to show when Defendant acquired the balance of the currency found in the storage locker, section 853(d) was unavailing.

Nor could the Government recover the full $43,070 as proceeds of the section 846 drug conspiracy. Because the conspiracy, by the terms set forth in the indictment, was limited to the agreement to commit the three substantive offenses, the marked bills that Defendant acquired from the undercover sales were the only proceeds forfeitable in connection with the conspiracy offense.

The dissenting judge (Beezer, J.) argued that the circumstances surrounding the seizure of the money in the storage locker made it plain that the full $43,070 was drug money. The cash was found in a brown paper bag and was bundled in rubber bands. The marked bills were commingled with the other funds, and marijuana packed for sale was found in the same

locker. Moreover, a contemporaneous search of Defendant's home revealed a pager, a gun, keys to the locker, and a tally sheet listing various drug transactions. Such evidence, the dissent said, was sufficient to show that the full amount found in the storage locker was proceeds of the conspiracy.

In addition, the dissent argued that, even if the full $43,070 could not be traced to the offenses for which Defendant was convicted, it was clear that those offenses involved $5,300. Therefore, the Government was entitled to forfeit that amount—the $4,300 found in marked bills plus another $1,000 to replace the money that was missing. Currency is fungible, the judge said:

> [T]he [G]overnment should not be required to prove that the actual bills found in [Defendant's] locker are the same pieces of paper that the undercover agent handed to [the codefendant].

The majority was unimpressed. —*SDC*

United States v. Garcia-Guizar, ___ F.3d ___, 1998 WL 736357 (9th Cir. Oct. 23, 1998). Contact: AUSA William S. Wong, ACAE01(wwong).

Comment: The dissent is surely correct that the Government, at the very least, was entitled to a money judgment for the $5,300 that the undercover agents paid to the defendant. The opinion does not reveal, however, whether the Government included either a money judgment provision or a request for substitute assets in the indictment or the preliminary order of forfeiture.

With respect to the rest of the opinion, the majority's opinion reflects the extremely limited nature of criminal forfeiture. Under section 853(a)(1), only the proceeds traceable to the offense for which the defendant is convicted may be forfeited. (Forfeiture of facilitating property under section 853(a)(2) is somewhat broader, as the majority points out.) As the dissent explains, the circumstances suggest that all of the money in the storage locker was derived from an ongoing series of drug sales taking place during the period when the defendant was selling drugs to the undercover agents. But, if both the substantive counts and the section 846 conspiracy were strictly limited to the undercover sales, it is not too surprising that the balance of the money found in the storage locker could not be forfeited. If the Government wants to forfeit such money as proceeds of a conspiracy, it must draft the conspiracy count broadly so that property found in the defendant's possession that is not traceable to specific drug sales may be forfeited.

Above all, this case is a compelling illustration of why we need civil forfeiture. Given the circumstantial evidence cited by Judge Beezer, it is virtually certain that the full $43,070 would be subject to forfeiture in a civil case under section 881. In civil cases, of course, the Government is required only to show that the property was derived from drug trafficking generally. It is not necessary to trace the money to any particular offense. *See United States v. One Lot of U.S. Currency ($36,674)*, 103 F.3d 1048 (1st Cir. 1997) (circumstantial evidence that money was involved in drug trafficking sufficient); *United States v. Parcels of Land*, 903 F.2d 36, 42 (1st Cir. 1990) (accepting circumstantial evidence and rejecting requirement that the Government must link seized properties with particular drug transactions); *United States v. Parcels of Real Property*, 913 F.2d 1, 3 (1st Cir. 1990) (same); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (same); *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984, 990 (E.D.N.Y. 1992) (same).

—*SDC*

CMIR / Knowledge Requirement / Excessive Fines

- **To forfeit unreported currency in a CMIR case, the Government must show that the claimant should reasonably have been aware of the likelihood of having to report the currency he was transporting out of the United States.**

■ **The excessive fines analysis utilized in criminal forfeiture actions pursuant to *Bajakajian* is applicable to civil forfeitures as well.**

Claimant failed to file a CMIR for $359,500 when he crossed the Peace Bridge heading from Upstate New York into Canada. The Government filed a civil forfeiture action, but the court denied forfeiture, finding that the Government presented insufficient evidence to prove that Claimant had actual knowledge of the currency reporting requirements. On appeal, the Second Circuit held that, while actual knowledge is not required for civil forfeiture, the Government must show that Claimant had constructive knowledge that he was required to report the currency he transported to satisfy the Due Process Clause of the Fifth Amendment. The case then was remanded to determine whether Claimant had constructive knowledge.

The case was soon stayed, however, pending the disposition of both criminal and civil income tax evasion cases filed against Claimant in the Eastern District of New York. Finally, the court held a bench trial on the constructive knowledge issue, but a decision was withheld once the court learned that the Supreme Court would hear a related issue in *United States v. Bajakajian*, ___ U.S. ___, 118 S. Ct. 2028 (1997).

After *Bajakajian* was decided, the court denied the forfeiture on two grounds. With respect to Claimant's constructive knowledge, the court noted that there were no signs or notices on either side of the bridge to inform travelers of the currency reporting requirements and that the only notices were posted inside of the U.S. administrative office. Moreover, a traveler leaving the United States had no contact with the administrative office or with U.S. officials and merely paid a toll on the U.S. side (U.S. Customs officers, however, personally greeted incoming travelers); Claimant was a legal resident alien of the United States who had completed only a second grade education in Italy, before moving to the United States 19 years earlier, and possessed a limited ability to read and write in English; and Claimant was not required to provide information regarding currency on any of the three previous occasions that he had departed from the United States.

Finally, the court held that publication of regulations in the Federal Register did not constitute constructive notice to a person in Claimant's circumstances. Transporting currency across the border, the court observed, is not a prohibited act or a regulated activity. For all of these reasons, the court held that Claimant did not have constructive notice of the CMIR reporting requirement.

In addition, the court held that the forfeiture of Claimant's $359,500 would be unconstitutional under *Bajakajian*. The only issue the court discussed was whether *Bajakajian* applies equally to criminal and civil forfeitures. The court held that it did. —*WJS*

United States v. $359,500 in U.S. Currency, ___F. Supp. 2d ___, Nos. 94-CV-661C and 84-CV-661C, 1998 WL 784010 (W.D.N.Y. Sept. 28, 1998). Contact: AUSA Gregory L. Brown, ANYW01(gbrown).

Excessive Fines

■ **An Eighth Amendment claim cannot be used as the basis for a section 1983 civil rights action against state officials who seized Plaintiff's car. Plaintiff must litigate the excessive fines issue in state court where the civil forfeiture action is pending.**

Plaintiff filed a civil rights suit, pursuant to 42 U.S.C. § 1983, against city agencies and employees for an allegedly wrongful seizure of a car for the purpose of forfeiting it under state law. One of the arguments made by Plaintiff was that forfeiture of the car was an excessive fine in violation of the Eighth Amendment. Another was that dismissal of the criminal case against him should have terminated the civil forfeiture case. Although the district court described the excessive fine argument as "not without merit," it declined to allow Plaintiff to litigate the issue in the section 1983 action.

Under *Younger v. Harris*, 401 U.S. 37 (1971), a district court will abstain from deciding certain issues based on three criteria: (1) a state proceeding is pending; (2) an important state interest is implicated;

and (3) the plaintiff has an open avenue for review of constitutional claims in the state proceeding. Here, there was a civil forfeiture action pending in state court where Plaintiff could raise the Eighth Amendment argument as a defense. The state case also involved the state's interest in proceeding with a civil forfeiture after a related criminal case is dismissed. Moreover, application of the *Younger* doctrine in this instance would avoid the risk of inconsistent judgments if the Eighth Amendment issue were litigated in both the state and federal cases.

Accordingly, the court denied Plaintiff's attempt to include the alleged Eighth Amendment violation as part of his civil rights claim. —*BB*

Mackey v. Property Clerk of the New York City, ___ F. Supp. 2d ___, No. 97-CIV-5336(HB), 1998 WL 744229 (S.D.N.Y. May 27, 1998).

Administrative Forfeiture / Notice

- **Notices of administrative forfeiture sent to owner's home and business addresses two days before he surrendered himself to authorities, pled guilty, and went to jail, satisfied due process despite owner's nonreceipt of the notices.**

- **Adequacy of notice is based upon the circumstances known to the Government at the time notice is sent.**

Plaintiff was arrested on drug charges after a consent search of his business and residence. In connection with his arrest, the Drug Enforcement Administration (DEA) seized several cars, currency, and guns for forfeiture under 21 U.S.C. § 881(a)(4), (6), and (11). DEA commenced administrative forfeiture proceedings against the seized assets by sending written notices to Plaintiff's business and residence addresses. Two days later, Plaintiff surrendered himself to authorities, pled guilty to the drug charges, and was incarcerated. The forfeiture notices were delivered to Plaintiff's home and business addresses and were signed for by Plaintiff's mother, his sister, and/or his business partner's wife.

Years after the property had been forfeited administratively, but within 28 U.S.C. § 2401's six-year statute of limitations for such suits, Plaintiff brought a civil action for the return of the property on the grounds that the administrative forfeitures were procedurally defective because the notices were inadequate to satisfy due process. Plaintiff argued that he never received actual notice of the forfeiture proceedings and that the DEA's mailing of the notices to his residence and business addresses when it knew that he would not receive them because he was incarcerated two days later violated his right to due process. He also submitted affidavits from his mother and his sister stating that, although they had received and signed receipts for the notices sent to Plaintiff's residence, they had not delivered or mentioned them to him, but had only left them in his room.

The district court acknowledged that it had equitable jurisdiction to hear Plaintiff's challenge to the sufficiency of the notice and to grant equitable relief. The court also acknowledged the general rule that notice of forfeiture proceedings sent to an owner's address does not comport with due process when the Government knows that the owner is in jail at the time the notice sent. The court stated that notice would be constitutionally deficient if the Government knew or should have known that the notice it sent would not reach the intended recipient, and added that the hallmark in such cases is a showing of bad faith on the part of the forfeiting authority.

In this case, the court found that the notices sent to Plaintiff's residence were constitutionally adequate. The notices were sent to an address that was current at the time the notices were mailed, and DEA had no way of knowing that Plaintiff would turn himself in to authorities and be incarcerated by the time the notices arrived. DEA's actions satisfied due process because: (1) the adequacy of notice is determined at the time that notice is sent; and (2) at the time that DEA sent the notices in this case, the mailings were reasonably calculated to provide Plaintiff notice of the forfeiture proceedings. In addition, the court found that DEA had no reason to believe that Plaintiff's mother, sister, and the wife of his business partner would not forward

the notices to him. The court stated that "DEA cannot be held responsible for [P]laintiff's failure to actually receive the notice sent to him because his family members and business associates treated the receipt of certified mail as unimportant." —*JHP*

Krecioch v. United States, ___ F. Supp. 2d ___, No. 98-C-11211, 1998 WL 748333 (N.D. Ill. Oct. 14, 1998). Contact: AUSA James J. Kubik, AILNO2(jkubik).

Alien Smuggling / Stipulation

- **A person who uses a boat to smuggle another person into the United States violates section 1324(a)(1)(A)(i). If he smuggles only himself into the United States, he violates section 1325. Forfeiture of the boat is possible for the former violation, but not for the latter.**

- **If the Government stipulates that its forfeiture action is based on the violation of a given statute, and the claimant relies on that stipulation, the Government will be estopped from asserting a different basis for the forfeiture later in the proceeding.**

Claimant's husband was arrested for entering territorial waters in a boat while using a false passport. The Government filed a complaint seeking to forfeit the vessel under 8 U.S.C. § 1324(b) for its alleged use in violation of the immigration laws under 8 U.S.C. § 1324(a)(1)(A). However, the Government did not specify which of the four subsections of 8 U.S.C. § 1324(a)(1)(A) it would rely on to forfeit the boat until the second pretrial status conference. At that time, the Government stipulated that the basis for forfeiture was section 1324(a)(1)(A)(i), which was violated when the husband brought himself into the jurisdiction with a false passport. The Government conceded that it would not use evidence regarding the smuggling of other persons into the jurisdiction.

After the stipulation, the Government filed a motion attempting to recant its prior stipulations and asserting the smuggling of additional aliens as an alternate basis for the forfeiture. But the court held that the Government was estopped from recanting its stipulations. It noted that reliance by the court and Claimant on the Government's assertions was reasonable, and that Claimant has been prejudiced by that reliance because a necessary witness was no longer in the United States. The court added that the Government is bound by a heightened pleading standard due to the "drastic nature of the forfeiture mechanism."

In dismissing the complaint, the court held that 8 U.S.C. § 1324(a)(1)(A)(i) deals exclusively with the smuggling of aliens as opposed to the illegal entry of an alien which is proscribed by 8 U.S.C. § 1325. That section does not contain a forfeiture provision. Therefore, under the stipulations, the Government could not forfeit the defendant vessel. —*HSL*

United States v. One 48 Ft. White Colored Sailboat Named "Libertine," ___ F. Supp. 2d ___, No. CIV-97-2884 (RLA), 1998 WL 743964 (D.P.R. Oct. 5, 1998). Contact: AUSA Jose Javier Santos-Mimoso, APR01(jsantos).

Summary Judgment / Standing

- **In a community property jurisdiction, a showing that the property seized was acquired during marriage is sufficient to establish a spouse's colorable interest and thus confer standing to contest forfeiture, even if the Government alleges that the property was drug proceeds.**

- **Government's motion for summary judgment is premature if made**

before the claimant has been afforded the opportunity to establish that the property was derived from a legitimate source through discovery.

Claimant contested the forfeiture of $104,080 that was seized from her husband, who was convicted and incarcerated for conspiracy to possess and distribute marijuana. The Government alleged that the money was drug proceeds and that Claimant had no standing to contest the forfeiture of such property under state community property law. Accordingly, the Government moved for summary judgment, and Claimant opposed the motion, arguing that she had standing and that the money was derived from a legitimate source.

The Government argued that, under state community property law, a spouse has no colorable claim to money that is derived from criminal activity. Thus, in the Government's view, Claimant lacked standing to contest the forfeiture. Claimant contended that standing was conferred by virtue of her interest in community property, and she challenged the adequacy of the Government's motion on the merits of the case in light of the latter's refusal to allow her to conduct discovery.

In order to establish standing in the context of civil forfeiture, a claimant must show a "facially colorable interest" in the proceedings sufficient to meet the case-or-controversy criteria required by Article III. Property ownership rights in a drug forfeiture action must be determined under state law and must be established before the court may decide whether the interest is forfeitable to the Government.

After analyzing the character of Claimant's interest in the money under California marital property law, the court determined that she had a colorable interest in the funds as community property sufficient to confer standing to file a claim. The court did not reach the merits of the claim to the funds, but rather decided that Claimant had the right to argue that she is entitled to a share. Nor did the court consider as dispositive the holding in a California appellate case cited by the Government, which determined that unlawfully obtained property cannot enter the marital community property.

Having found that Claimant had standing to contest the forfeiture action, the court turned to her "legitimate source" defense. Claimant bears the burden of refuting the Government's showing that the funds were generated by narcotics trafficking, the court said. Accordingly, Claimant must be afforded, through the process of discovery, an opportunity to provide specific facts to establish material issues regarding the legality of the source of the funds. Until discovery has been conducted, the court could not assess the existence of material issues. The Government's motion for summary judgment was therefore denied. —*WJS*

United States v. $104,080 in U.S. Currency, No. 98-CV-1581-K (CGA) (S.D. Cal. Nov. 13, 1998) (unpublished). Contact: AUSA Leah Bussell, ACAS02(lbussell).

Relation Back Doctrine / Trustee / RICO

- **Trustee appointed by the court to liquidate a forfeited corporation has the authority to sue the former directors of the corporation and recover damages on the Government's behalf.**

- **That the acts of the former directors occurred before the corporation was forfeited is irrelevant. Under the relation back doctrine, the Government had an interest in the corporation at the time the acts of racketeering took place. Therefore, the Government was the party injured by the defendants' mismanagement.**

A corporation committed a RICO violation and was criminally forfeited to the United States. The court then appointed a trustee, pursuant to 18 U.S.C. § 1963(e), to liquidate the corporation. In the course of his duties, the trustee filed a lawsuit against the former

directors of the corporation seeking damages arising out of their mismanagement.

The former directors argued that the trustee lacked standing to pursue the cause of action because their mismanagement, if any, occurred before the corporation was forfeited, and therefore before the United States had any interest. But the court held that, under the relation back doctrine, the Government's interest in the corporation existed at the time the acts of racketeering took place. The entry of the order of forfeiture merely perfected that interest. Therefore, the Government was the party injured by the former directors' mismanagement, and the trustee was authorized to sue the former directors and recover damages on the Government's behalf. —*SDC*

First American Corporation v. Al-Nahyan, 17 F. Supp. 2d 10 (D.D.C. 1998).

Quick Notes

■ Money Judgment / Money Laundering

The Seventh Circuit upheld a forfeiture order in which a husband and wife were held jointly and severally liable to pay a money judgment equal to the value of the property that was concealed from a bankruptcy court and subsequently laundered in violation of 18 U.S.C. § 1956.

United States v. Holland, ___ F.3d ___, No. 97-3148, 1998 WL 768499 (7th Cir. Nov. 5, 1998). Contact: AUSA Steven DeBrota, AINS01(sdebrotha).

■ Final Order of Forfeiture / Appeal

In an unpublished decision, the **Third Circuit** held that a defendant must appeal from the entry of the *preliminary* order of forfeiture and may not withhold his appeal until the final order is entered at the end of the ancillary proceeding. The preliminary order terminates the defendant's interest in the property, the court said. The final order adjudicates only the rights of third parties. Because "the success or failure of any third-party petition under [s]ection 853(n) can have no impact on the defendant's rights," the court held, he must appeal from the preliminary order and lacks standing to challenge the final order.

United States v. Rashid, No. 97-1421 (3d Cir. Oct. 28, 1998). Contact: AUSA Tai Aspinwall, APAE12(taspinwa).

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